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No. 95-409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PROMETHEUS FUNDING CORP., etc., et al.,
Petitioners,

v.

MERCHANTS HOME DELIVERY SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS SUPPORTING RESPONDENT

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners and their *amici* contend that allowing persons injured in their business or property by a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") that involves insurance, to bring suit under that Act would "impair" the enforcement of the California Insurance Code. The National Association of Insurance Commissioners ("NAIC"), whose members are the principal state insurance regulators, strenuously disagrees with the notion that RICO impairs any state's insurance laws. The NAIC urges, to the contrary, that RICO enhances the effective enforcement of those laws. Thus, the NAIC intervened as *amicus* in support of the Respondent in the Court of Appeals. It does so again here by consent of both parties in order unequivocally to apprise the Court that the NAIC opposes the petition for certiorari.

INTEREST OF THE AMICUS CURIAE

The NAIC is an association made up of the officials principally responsible for the regulation of insurance in all 50 states, the District of Columbia, and the territories and insular possessions of the United States. It strives to educate regulators and the industry, to eliminate conflicts between states, to advance uniformity of regulations where appropriate, and to sponsor and support activities that further effective enforcement of insurance laws.

One of the NAIC's most important roles is the promulgation of "Model Acts" for adoption by the various states, governing various aspects of the regulation of insurance. These documents are drafted through a consultative process among industry members, consumers, and regulators meant to develop consensus, eliminate technical problems, and ensure that the resulting law can be widely and uniformly adopted. California's Unfair Insurance Practices Act (UIPA) (Cal. Ins. Code § 790, *et seq.*) is substantially derived from the NAIC's Unfair Trade Practices Model Act.[1] The NAIC, then, is uniquely well-suited to inform this Court concerning the purposes and intent of the statute in question, and intensely interested in its proper interpretation.

In addition, the NAIC is deeply involved in helping its members fight insurance fraud and deceptive practices. The NAIC maintains a database of information about dubious characters involved in the insurance industry, supplies regulators with technical assistance and practical advice about fighting fraud, and works with the FBI, the Department of Labor, and other federal offices in anti-fraud activities. NAIC members themselves have made fruitful use of RICO to pursue the perpetrators of insurance fraud and the compensation of their victims in situations where the members were vested with the claims of defrauded insolvent insurers.[2] NAIC members have often

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[1] The 1972 text of the Unfair Trade Practices Model Act, which closely resembles the UIPA, is reprinted in the Appendix.

[2] Examples of such efforts which have resulted in (continued...)

supported and cooperated in federal criminal prosecutions of insurance fraudfeasors.[3]

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[2] (...continued)
published opinions include *Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443 (9th Cir. 1986); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *In Re Diamond Benefits Life Insurance Co. and American Universal Insurance Co. Contracts Litigation*, M.D.L. No. 972 (D.Ariz. March 27, 1995) (Strand, J.); *Clark v. Milam*, 847 F. Supp. 409 (S.D.W.Va. 1994); *Durish v. Uselton*, 763 F. Supp. 192 (N.D.Tex. 1990); *State of North Carolina ex rel. Long v. Alexander & Alexander Services, Inc.*, 680 F. Supp. 746 (E.D.N.C. 1988). No RICO case brought by an insurance liquidator has ever been dismissed on McCarran Ferguson grounds.

[3] That federal prosecution of insurance charlatans for mail or wire fraud does not "impair" the state regulation of insurance was established in *United States v. Sylvanus*, 192 F.2d 96 (7th Cir.1951), *cert. denied*, 342 U.S. 943 (1952). Other examples of such prosecutions include *United States v. Cosentino*, 869 F.2d 301 (7th Cir.), *cert. denied*, 492 U.S. 908 (1989) (siphoning off insurance company assets through affiliated broker); *United States v. Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974) (embezzlement of premium dollars from undercapitalized insurer); *United States v. Kreimer*, 609 F.2d 126 (5th Cir. 1980) (fraud against insurance company by agents, who accepted secret fees and commissions); and *United States v. Ferrell Travis Riley, et al.*, No. 94-00197-01/03-LR-W-8, Mealey's Insurance Insolvency Reporter, December 14, 1994 at 16 (W.D. Mo. 1994) (bribery of insurance (continued...)

The unfortunate fact is that insurance lends itself all too readily to fraud. As the House Committee on Energy and Commerce explained:

> The business of insurance is uniquely suited to abuse by mismanagement and fraud. Making believable promises is a stock item in every con man's bag of tricks. The prepayment of large, often vast, sums of money with few restrictions lends itself naturally to monumental wasting of assets through greed, incompetence, and dereliction of duty. This combination of easy money based on easy promises makes the insurance industry an irresistible target for financial knaves and buccaneers.

Staff of House Committee on Energy and Commerce, 101st Cong. 2d Sess., "Failed Promises: Insurance Company Insolvencies" (Comm. Print 101-P 1990).

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[3] (...continued)
commissioners and false reporting on financial statements). *United States v. Miro*, 29 F.3d 194 (5th Cir. 1994) involved the mail fraud conviction of a fraudfeasor who caused losses conservatively estimated at $20 million, by means of United States and foreign insurance companies.

Recently, a criminal RICO action has snared the notorious Alan Teale. *United States v. Alan Teale, et al.*, No. 93-00002, Mealey's Insurance Insolvency Reporter, August 18, 1993 at 9 (S.D. Ala. 1993).

Many states have established fraud divisions within their insurance departments, and some have enacted anti-fraud statutes, but none has even tried to occupy the field of legislation against insurance-related fraud. Indeed, not even the powerful assistance of the McCarran-Ferguson Act 15 U.S.C. § 1011 *et seq.* eliminates the need for state regulators to employ federal remedies for insurance fraud. The nationwide service of process available in civil RICO cases, 18 U.S.C. 1965, and the broad reach of federal criminal jurisdiction permit pursuit of complex, multi-jurisdictional frauds which would otherwise be unreachable in state court.

The availability of federal criminal and civil remedies for insurance fraud is indeed a matter of great national importance. The NAIC agrees, however, with the respondent herein that the decision of the Ninth Circuit, which is not contradicted by any authoritative precedent, is correct and does not require review. Therefore, the NAIC urges that the Court deny the petition for certiorari.

ARGUMENT

A.

THE NINTH CIRCUIT CORRECTLY OBSERVED THAT UNFAIR TRADE PRACTICES ACTS, SUCH AS CALIFORNIA'S UIPA, ARE MEANT TO SUPPLEMENT, NOT SUPERSEDE, PRIVATE RIGHTS OF ACTION.

In deciding that the application of RICO to an insurance dispute would not "invalidate, impair, or

supersede" any state law regulating the business of insurance within the meaning of McCarran-Ferguson, the Ninth Circuit correctly interpreted the intentions of the drafters of the Unfair Trade Practices Model Act. The interplay between various provisions of the Model Act and private causes of action has been the subject of extensive debate as the Model Act and its amendments have developed.

Since at least 1959, the Model Act and California's UIPA have included savings clauses for claims arising under other state law:

> No order to cease and desist issued under this article ... or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any ...civil liability ... under the laws of this State arising out of the methods, acts, or practices found unfair or deceptive.

Cal. Ins. Code §790.09 (West 1995).

In the early 1970's, the NAIC considered amendments to the Model Act to expand the regulators' remedial options and to address unfair insurance claims settlement practices. One proposal would have allowed departments of insurance to bring class actions on behalf of injured consumers for relief from unfair practices. Another would have expanded the remedies available to the departments of insurance, once an unfair practice had been demonstrated, to include orders directing the guilty party to make restitution to those injured by its practices. An Industry Advisory Group successfully argued against the inclusion of "restitutionary" remedies in the new law contending that such remedies

were unnecessary because "persons injured have an adequate remedy at law," and that it was inappropriate to have the Commissioner of Insurance assume "a role that is usually the province of a jury -- that is, ascertain who may have been harmed and to what extent." Proceedings of the Laws, Legislation & Regulation Committee, 1972-1 NAIC Proc. 490 at 509 (1972).

The petitioners' argument to this Court, that the UIPA is such a comprehensive regulatory scheme that it would supersede existing private remedies, is flatly contradicted by both the text and the legislative history of the law. While it is true that no mention is made of uniquely federal remedies like RICO, nothing in the debates surrounding the Model Act suggests that the drafters meant to foreclose the enforcement of any private remedies for fraud, whether state or federal.

B.

THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH NO DECISION OF THIS COURT AND NO DECISION OF ANY OTHER FEDERAL COURT OF APPEALS.

The Ninth Circuit Court of Appeal undertook an analysis of whether the conduct complained of by the respondents involved the "business of insurance" within the meaning of McCarran-Ferguson, concluding that some did and some did not. That analysis, however, was mooted by its later conclusion that nothing in RICO "invalidated, impaired, or superseded" the UIPA. Petitioners' attempt to manufacture a conflict between this opinion and others focuses on the nature of the "business of insurance," but

ignores the court's overriding conclusion that no conflict exists between state law and RICO.

Interpretation of the term "business of insurance" is not uncomplicated. There is room for disagreement over its application to the facts of this case, and it is possible to identify real and imaginary conflicts among the cases discussing it. But under these circumstances, the issue is a red herring. Unless RICO "invalidates, impairs or supersedes" the California's UIPA, its application to the business of insurance, whatever that may be, is permitted by McCarran-Ferguson.

This Court has consistently ruled that the general provisions of McCarran-Ferguson apply only to laws which "directly conflict" with applicable state insurance law. *Securities & Exch. Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969); *United States Department of the Treasury v. Fabe.*, 113 S. Ct. 2202 (1993). The Seventh Circuit followed that rule in *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2335 (1993), and the Ninth Circuit in this case adopted the reasoning of the Seventh. There is no conflict between these cases.

Petitioners point to two state court decisions supposedly contradictory to the instant holding. However, one of them is an intermediate court decision whose principal rationale has been overruled by a later case in the state's Supreme Court.[4] The other, a decision of the intermediate court of

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[4] *American International Group v. Superior Court,* 234 Cal. App. 3d 749, 765-7, 285 Cal. Rptr. 765, 775-777 (2d

(continued...)

Pennsylvania, expressly identified its cursory conclusions concerning the conflict between RICO and state insurance law as *dictum*. *Leckey v. Aetna Casualty and Surety Co.*, 404 Pa. Super. 323, 590 A.2d 1255 (1991).

Petitioners point to a number of decisions of federal district courts which denied RICO relief to respondents defrauded by insurance related conduct. As support for their certiorari claims, these cases suffer from a number of defects:

1. Because they are trial court decisions, they present no ripe controversy to this court. (Supreme Court Rule 10)

2. Some of them apply laws which either contain the "restitution" provisions rejected by the drafters of the Model Act, *Everson v. Blue Cross & Blue Shield*, No. 93CV7534, 1994 WL 675200 (N.D. Ohio, Jun. 15, 1994); *Ambrose v. Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), or lack the express savings clause contained in both the California law in issue here, and in the Model Act. *Wexco, Inc. v. IMC, Inc.*, 820 F. Supp. 194 (M.D. Pa. 1993); *Senich v. Transamerica Premier Insurance Co.*, 766 F. Supp. 339 (W.D. Pa. 1990); *Forsyth v. Humana, Inc.*,

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[4] (...continued)
Dist. 1991), *cert. denied,* 504 U.S. 911 (1992) assumed that California's UIPA superseded private remedies for the conduct proscribed by the law. If so, then federal remedies were likewise preempted. However, the California Supreme Court held the contrary, in *Manufacturers Life Ins. Co. v. Superior Court,* 10 Cal. 4th 257, 895 P.2d 56 (1995).

827 F. Supp. 1498 (D. Nev. 1993)), thus raising substantially different issues.

3. Others apply, to the general McCarran-Ferguson rule, the analysis applicable to the McCarran-Ferguson proviso for the Sherman, Clayton, and FTC Acts, *Gordon v. Ford Motor Credit Co.*, 868 F. Supp. 1191 (N.D. Cal. 1992); *Richhart v. Metropolitan Life Ins. Co.*, 1990 U.S. Dist. LEXIS 3597 (E.D. Pa. 1990), an error that is unlikely to be repeated in light of this Court's ruling in *United States Department of the Treasury v. Fabe.*, 113 S. Ct. 2202 (1993).

4. Several assume, contrary to fact, that the "comprehensive regulatory scheme" envisioned by the drafters of the insurance practices laws did not contemplate the survival of private civil remedies. *Wexco, Inc. v. IMC, Inc.*, 820 F. Supp. 194 (M.D. Pa. 1993); *Senich v. Transamerica Premier Insurance Co.*, 766 F. Supp. 339 (W.D. Pa. 1990); *Everson v. Blue Cross & Blue Shield*, No. 93CV7534, 1994 WL 675200 (N.D. Ohio 1994); *Ambrose v. Blue Cross & Blue Shield of Va.*, Inc., 891 F. Supp. 1153, (E.D. Va. 1995).

The "issue of nationwide importance" discovered by the petitioners, then, is a tempest in a teapot.

C.

PETITIONERS CANNOT COMPLAIN OF CONFUSION AND UNCERTAINTY AS TO THE REMEDY FOR THEIR CONCEDEDLY ILLEGAL AND FRAUDULENT CONDUCT.

It is common ground that, if the respondent has a case at all, it is based on fraud and outright theft by persons for whose actions the petitioners are liable. The serious betrayal of a customer's trust which the respondent alleges here deserves little protection from this, or any, court. The "confusion" and "uncertainty" to which the petitioners refer relates, not to the propriety of the conduct of their agents, but to whether this plaintiff can complain about it. As the California Supreme Court pointed out in a similar case:

> In essence, their claim is that they believed they could violate the law and be subject only to sanctions imposed by the Insurance Commissioner. Principles of *stare decisis* do not protect a person from the consequences of actions based on such a belief.

Manufacturers Life Insurance Company v. Superior Court, 10 Cal. 4th 257, 895 P.2d 56 (1995).

CONCLUSION

For all of these reasons, the National Association of Insurance Commissioners joins the respondent herein in opposing the petition for a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX

NAIC Unfair Trade Practices Model Act

Proceedings of the National Association of Insurance Commissioners, 1972, Volume I

Regular Meeting, Miami Beach, Florida

November 28, 1971 - December 3, 1971

1972-1 NAIC Proc. 490

AN ACT RELATING TO UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE

As adopted by the NAIC Laws, Legislation and Regulation (B) Committee.

SECTION 1 -- DECLARATION OF PURPOSE.

The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

SECTION 2 -- DEFINITIONS.

When used in this Act:

(a) "Person" shall mean any individual, corporation,

association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. Person shall also mean medical service plans and hospital service plans as defined in Section. For purposes of this Act, medical and hospital service plans shall be deemed to be engaged in the business of insurance.

Drafting Note: This definition could also include dental, optometric, and other service plans. The enabling statutes of all service plans should also be amended to make them subject to this Act.

(b) ("Commissioner") shall mean the (Commissioner) of Insurance of this state.

(c) "Insurance policy" or "insurance contract" shall mean any contract of insurance, indemnity, medical or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person.

Drafting Note. Each state may wish to consider the advisability of defining "insurance" for purposes of this Act if its present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient. "Service contract" is intended to cover the product issued by medical and hospital service plans and should be changed to conform to the laws of each state.

NAIC Unfair Trade Practices Model Act

SECTION 3 -- UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES PROHIBITED.

No person shall engage in this state in any trade practice which is defined in this Act as, or determined pursuant to Section 7 of this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

SECTION 4 -- UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

(1) **MISREPRESENTATIONS AND FALSE ADVERTISING OF INSURANCE POLICIES**. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustrations, circular or, statement, sales presentation, omission, or comparison which:

(a) misrepresents the benefits advantages conditions, or terms of any insurance policy; or

(b) misrepresents the dividends or share of the surplus to be received on any insurance policy; or

(c) makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy; or

(d) is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates;

(e) uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof

(f) is a misrepresentation for the purpose of inducing or tending to induce to the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy; or

(g) is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(h) misrepresents any insurance policy as being shares of stock.

(2) **FALSE INFORMATION AND ADVERTISING GENERALLY.** Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of

his insurance business, which is untrue, deceptive or misleading.

(3) **DEFAMATION.** Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person

(4) **BOYCOTT, COERCION AND INTIMIDATION.** Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in reasonable restraint of, or monopoly in, the business of insurance.

(5) **FALSE STATEMENTS AND ENTRIES.**

(a) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person

(b) Knowingly making any false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) **STOCK OPERATIONS AND ADVISORY BOARD CONTRACTS.** Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) **UNFAIR DISCRIMINATION.**

(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes this paragraph should be omitted.

NAIC Unfair Trade Practices Model Act

(8) **REBATES.**

(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in clause (7) or paragraph (a) of clause (8) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:

(i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses;

(iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

Drafting Note: Each state may wish to examine its rating laws to assure that they contain sufficient provision against rebating. If they do not, this section might be expanded to cover all lines of insurance.

(9) **UNFAIR CLAIM SETTLEMENT PRACTICES.**

Committing or performing with such frequency as to indicate a general business practice any of the following:

(a) misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

NAIC Unfair Trade Practices Model Act

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;

(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or

claimants for the pourpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(l) delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(10) **FAILURE TO MAINTAIN COMPLAINT HANDLING PROCEDURES.** Failure of any person to maintain a complete record of all the complaints which it has received since the date of its last examination under S... This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. For purposes of this Subsection, "complaint" shall mean any written communication primarily expressing a grievance.

Drafting Note: Each state may wish to consider

exempting agents and brokers from this Subsection.

(11) **MISREPRESENTATION IN INSURANCE APPLICATIONS.** Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurers, agent, broker, or individual.

(12) Any violation of any one of Section

Drafting Note: Insert section numbers of any other sections of the Insurance Law which it is deemed desirable or necessary to include as an unfair trade practice.

SECTION 5. FAVORED AGENT OR INSURER; COERCION OF DEBTORS.

(a) No person may

(i) require, as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation the creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurer or group of insurers or agent or broker or group of agents or brokers;

(ii) unreasonably disapprove the insurance policy provided by a borrower for the protection of the property securing the credit or lien; or

(iii) require directly or indirectly that any borrower,

morgagor, purchaser, insurer, broker, or agent pay a separate charge, in connection with the handling of any insurance policy required as security for loan on real estate, or pay a separate charge to substitute the insurance policy of one insurer for that of another.

(iv) use or disclose information resulting from a requirement that a borrower, mortgagor or purchaser furnish insurance of any kind on real property being conveyed or used as collateral security to a loan, when such information is to the advantage of the mortgage, vendor, or lender, or is to the detriment of the borrower, mortgagor, purchaser, insurer, or the agent or broker complying with such a requirement.

(b) (i) Paragraph a(iii) does not include the interest which may be charged on premium loans or premium advancements in accordance with the security instrument;

(ii) For purposes of par. (a)(ii), such disapproval shall be deemed unreasonable if it is not based solely on reasonable standards uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for the disapproval of an insurance policy because such policy contains coverage in addition to that required.

(iii) The (Commissioner) may investigate the affairs of any person to whom this subsection applies to determine whether such person has violated this subsection. If a violation of this subsection is found, the person in violation

shall be subject to the same procedures and penalties as are applicable to other provisions of this Act.

(iv) For purposes of this section, "person" includes any individual, corporation, association, partnership, or other legal entity.

SECTION 6 -- POWER OF COMMISSIONER.

The (Commissioner) shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by Section 3 of this Act.

SECTION 7 -- DEFINED AND UNDEFINED PRACTICES: HEARINGS, WITNESSES, APPEARANCES, PRODUCTION OF BOOKS AND SERVICE OF PROCESS.

(a) Whenever the (Commissioner) shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice whether or not defined in Section 4 or 5, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the (Commissioner) requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the (Commissioner) shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this Act shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The (Commissioner), upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require that production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The (Commissioner), upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the (Commissioner) shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the court of county or the county where such party resides, on application of the (Commissioner), may issue an order

requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and otherprocesses of the (Commissioner) under this Act may be served by anyone duly authorized by the (Commissioner), either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

SECTION 8 -- CEASE AND DESIST AND PENALTY ORDERS AND MODIFICATIONS THEREOF.

(a) If, after such hearing, the (Commissioner) shall determine that the person charged has engaged in an unfair method of competition, or on unfair or deceptive act or practice he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation a copy of such findings and an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is a violation of Sections 4 or 5, the (Commissioner) may at his discretion order any one or more of the following:

(A) payment of a monetary penalty of not more than $1000 for each and every act or violation but not to exceed an aggregate penalty of $10,000 *unless the person knew or reasonably should have known he was in violation of this Act, in which case the penalty shall be not more than $5000 for each and every act or violation but not to exceed an aggregate penalty of $50,000 in any six month period.*[1]

(B) suspension or revocation of the person's license if he knew or reasonably should have known he was in violation of this Act.[, or

(C) such other relief as is reasonable and appropriate.][2]

(b) Until the expiration of the time allowed under section 9 of this Act for filing a petition for review (by appeal or writ of certiorari) if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the court, as hereinafter provided, the (Commissioner) may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed

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[1] Material in italics added by the Laws, Legislation and Regulation (B) Committee.

[2] Material in brackets was deleted by the Law, Legislation and Regulation (B) Committee.

within such time, the (Commissioner) may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

SECTION 9 -- JUDICIAL REVIEW OF ORDERS.

Any person subject to an order of the (Commissioner) under section 8 or Section 11 may obtain a review of such order by filing in the court of county, within days from the date of the service of such order, a written petition praying that the order of the (Commissioner) be set aside. A copy of such petition shall be forthwith served upon the (Commissioner), and thereupon the (Commissioner) forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the (Commissioner). Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the (Commissioner), and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the (Commissioner), in whole or in part. The findings of the (Commissioner) as to the facts, if supported by evidence, shall be conclusive.

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Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the Commissioner's determination.

(b) To the extent that the order of the (Commissioner) is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the (Commissioner). If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the (Commissioner), the court may order such additional evidence to be taken before the (Commissioner) and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The (Commissioner), may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which if supported by evidence shall be conclusive, and his recommendation if any, for the modification or setting aside of his original order, with the return of such additional evidence.

Drafting Note: Insert appropriate language to accommodate to local procedure the effect given the Commissioner's determination. In a state where the final judgment, order to decree would not be subject to review by an appellante court provision therefor should be here inserted.

(c) An order issued by the (Commissioner) under section 8 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the (Commissioner) may thereafter modify or set aside his order to the extent provided in section 8(b); or

(2) Upon the final decision of the court if the court directs that the order of the (Commissioner) be affirmed or the petition for review dismissed.

(d) No order of the (Commissioner) under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

SECTION 10 -- JUDICIAL REVIEW BY INTERVENOR.

If after any hearing under Section 7 or Section 11, the report of the (Commissioner) does not charge a violation of this Act, then any intervenor in the proceedings may within days after the service of such report, cause a petition (notice of appeal) (petition for writ of certiorari) to be filed in the court of county for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the (Commissioner), constitutes a violation of this Act and containing penalties pursuant to Section 8.

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Drafting Note: The type of procedure should conform to state procedure. See also note to Section 9 concerning review by appellate courts.

SECTION 11 -- PENALTY FOR VIOLATION OF CEASE AND DESIST ORDERS.

Any person who violates a cease and desist order of the (Commissioner) under section 8, and while such order is in effect, may after notice and hearing and upon order of the (Commissioner) be subject at the discretion of the (Commissioner) to any one or more of the following:

(a) a monetary penalty of not more than $10,000 for each and every act or violation; or

(b) suspension or revocation of such person's license.[; or

(c) such other relief as is reasonable and appropriate.][3]

SECTION 12 -- REGULATIONS.

The (Commissioner) may, after notice and hearing, promulgate reasonable rules and regulations, as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by Sections 4 or 5, but the regulations shall not enlarge upon or extend the provisions of Sections 4 and 5. Such

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[3] Material in brackets was deleted by the Laws, Legislation and Regulation (B) Committee.

regulations shall be subject to review in accordance with Section .

Drafting Note: Insert section number providing for review of administrative orders.

SECTION 13 -- PROVISIONS OF ACT ADDITIONAL TO EXISTING LAW.

The powers vested in the (Commissioner) by this Act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

SECTION 14 -- IMMUNITY FROM PROSECUTION.

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and

the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the Insurance Law of this state. Any such individual may execute, acknowledge and file in the office of the (Commissioner) a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

SECTION 15 -- SEPARABILITY PROVISION.

If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby.